



REC'D TN
REGULATORY AUTH.

'01 MAR 28 PM 3 27

OFFICE OF THE
EXECUTIVE SECRETARY

Via Overnight Delivery

27 March 2001

Mr. David Waddell
Executive Director
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

Re: Docket To Establish Generic Performance Measurements, Benchmarks, and Enforcement Mechanisms for BellSouth Telecommunications, Inc., Docket No. 01-00193

Dear Mr. Waddell:

The Association of Communications Enterprises (ASCENT), on behalf of its members and pursuant to the Tennessee Regulatory Authority's March 12, 2001 *Notice of Filing* in the above-referenced proceeding, files this letter in lieu of comments regarding the development of a performance measurements, benchmarks, and enforcement mechanisms to ensure BellSouth provides nondiscriminatory access to network elements. ASCENT commends the TRA for pursuing development of BellSouth performance measurements for Tennessee. Clearly, BellSouth performance measurements will help guarantee that BellSouth continues to comply with the 1996 Telecommunications Act's wholesale obligations, once BellSouth obtains its highly prized in-region interLATA market authority.

It is critically important for the TRA to develop *meaningful* performance measurements and benchmarks that will serve as strong compliance incentives for BellSouth, rather than a "cost of business" for impeding its competitors' efforts. Performance measurements and benchmarks, in the form of Performance Assurance Plans (PAP) have already proven critical in ensuring continued incumbent compliance with the wholesale obligations of the Act in states such as New York and Texas. ASCENT expects that BellSouth will propose the use of a plan which adopts a statistical and payment structure consistent with the Texas PAP, as the other similarly situated incumbents have proposed in other proceedings.¹ Although the Texas PAP did indeed receive FCC approval as BellSouth will stress, the Texas plan should not be presumed ideal, nor necessarily acceptable in its current form.

The FCC in its June Texas 271 Order² drew on its experience with Bell Atlantic-New York's 271 application, when reiterating the elements of an effective PAP that fell into a "zone of reasonableness" and would be likely to provide sufficient incentives to foster post-entry checklist compliance. Citing to its Bell Atlantic - New York 271 order, these key elements include: 1) a potential liability that provides a meaningful and significant incentive to comply with the designated performance standards; 2) clearly-

¹ See, e.g., Qwest Performance Assurance Plan, filed September 22, 2000 with the Regional Oversight Committee in response to its scheduling of a series of post-271 workshops to develop a regional Performance Assurance Plan.

² *In the Matter of Application by SBC Communications Inc., Southwestern Bell Telephone Company, And Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas*, CC Docket 00-65, Memorandum Opinion and Order (June 30, 2000) ["Texas 271 Order"], at ¶422 *et seq.*

Mr. David Waddell
27 March 2001

Page 2

articulated, pre-determined measures and standards, which encompass a comprehensive range of carrier-to-carrier performance; 3) a reasonable structure that is designed to detect and sanction poor performance when it occurs; 4) a self-executing mechanism that does not leave the door open unreasonably to litigation and appeal; and 5) reasonable assurances that the reported data is accurate.³ The FCC recognized that state plans would, however, indeed vary.⁴

From an economic perspective, the purpose of performance measurements and benchmarks are to deter BellSouth from engaging in anticompetitive behavior and to provide an incentive for reliable performance. These objectives can only be achieved if the magnitude of the financial consequences of discriminatory behavior by BellSouth are greater than the expected value of the gains that BellSouth will be able to earn through such calculated performance. The FCC noted of the Texas PAP that its penalties "would discourage anti-competitive behavior by setting the damages and penalties at a level above the simple cost of doing business."⁵ But the proverbial devil is in the details.

The structuring of the penalties is as important as the penalties themselves. Efforts to cap penalties or to otherwise limit penalties on a regional basis, by measure, by period, by type of non-performance, or in any manner that mitigates the effect of BellSouth's non-performance, will dilute what could otherwise appear to be substantial penalties. If substandard or non-performance continues, penalties should increase in their severity for the duration of such performance. And competitors affected by BellSouth's non-performance should be fully indemnified for their related costs, rather than being expected to assume the cost of service-affecting problems caused through no fault of their own, by a non compliant vendor. BellSouth should not be allowed to mitigate its liabilities through a series of limiting provisions whose net effect is to render non-performance penalties meaningless.

We should not be lulled into believing that because any plan developed in this proceeding may contain the general *elements* found in the FCC approved Texas PAP, that the plan will accomplish its *objectives*. ASCENT urges the development of a plan that will provide the necessary incentives for BellSouth to meet its market opening obligations, and assurances that competitors will be able to serve their customers reliably when obtaining underlying services, facilities, and interconnection from BellSouth.

Sincerely,

Association of Communications Enterprises



Andrew O. Isar

³ *Bell Atlantic New York Order* 15 FCC Rcd at 4166-67, para. 433.

⁴ "While the details of such mechanisms developed at the state level may vary widely, we believe that we should examine certain key aspects of these plans to determine whether they fall within a zone of reasonableness, and are likely to provide incentives that are sufficient to foster post-entry checklist compliance." *Ibid.*

⁵ Texas Order at ¶423.